

**MINUTES OF THE MEETING OF
THE PARTNERSHIPS AND LIMITED LIABILITY COMPANIES COMMITTEE
OF THE BUSINESS LAW SECTION OF THE CALIFORNIA STATE BAR**

November 13, 2008

Charles E. McKee, Chair of the Committee, called the meeting to order at 10:00 A.M. Members present were Steve Halper, Phil Jelsma, Jessica Karner, Brad Rogerson, and Don Scotten. Also present were liaisons Rick Burt, David LaRiviere, April Pearson, and Mark Porter, and guests Jim Donlan, Greg Kelly, Andy Mittler, Karen Rochelle, and Dale Short.

I. Administrative Matters

A. Minutes of the Prior Meeting. The Minutes for the October 16, 2008 meeting were reviewed and were approved.

B. Membership. Charles McKee announced that the Committee had 16 members of a total authorized 24 members. He stated that an E-Bulletin had been sent to the Committee's constituency, and there had been a very positive response with 7-8 prospects, several of whom were in attendance. Included in the responses was a third-year law student, and the Committee discussed and agreed to have associate members. The application of Steve Halper for membership has been approved by the Executive Committee, and Steve acknowledged that he had received his letter of appointment.

C. Business Law Section Committee Liaisons.

1. Executive Committee. David LaRiviere introduced himself as the liaison, and explained his role as the liaison from the Executive Committee, which includes the communication of information both to and from the Executive Committee. Mark Porter introduced himself as the alternate liaison.

2. Corporations Committee. Rick Burt introduced himself as the liaison from the Corporations Committee. He is also a former member of this Committee as well. He stated that the Secretary of State has proposed regulations for the naming of corporations, limited partnerships, and limited liability companies. Comments to the proposed regulations are due December 15. He agreed to provide a copy to the Chair to be sent to the Committee's constituency. Rick also reported that the legislature might be considering a new type of corporation, informally called a B corporation, in which the shareholders could elect that the fiduciary duty of the directors could include consideration of the public benefit in their decision making. A proposal last year to allow the directors of all corporations to consider the public interest was opposed by the Corporations Committee, because the standard was too vague and the corporation's shareholders had no choice in whether directors would be able to consider matters other than the shareholders' benefit. Rick also reported that the Department of Corporations was considering proposing safe harbor rules as to when officers and employees of an issuer would not be considered brokers when participating in an offering by the issuer.

3. Agribusiness Committee. April Pearson introduced herself as the liaison from the Agribusiness Committee, and briefly discussed the role of that committee.

II. Subcommittee Reports

A. Publications Subcommittee (John Spomer). Charles McKee announced the deadlines to submit articles for the *Business Law News*, and the next deadline was January 15, 2009, to submit articles for the Annual Review issue. He encouraged members of the Committee to consider writing articles for publication. Don Scotten announced that he is preparing an article for the next issue, and is working with the *BLN* staff.

B. Programs Subcommittee. Charles McKee announced that Phil Jelsma had presented the program “ReRULPA Has Arrived” at the State Bar Annual Meeting in September, and that the program was very well received by those in attendance. Phil Jelsma announced that his webinar on ReRULPA would be scheduled for January 8, 2009, at 11:00, after the Committee meeting. He is working with the Section Coordinator for publicity and support. The proposal for a program on LLC and partnership taxation is in the works, and Brad Rogerson agreed to contact Ben Kwon and help prepare an outline. Charles McKee suggested that the Taxation Section of the State Bar may be a source of assistance, if needed. Mark Porter suggested that this would be a program with appeal beyond the Committee’s constituency, and that the Business Law Section should be considered for advertising the program.

C. Legislation Subcommittee (Phil Jelsma). Phil Jelsma reported that the legislature is in special session due to the budget situation, but he has not heard of any matter that would specifically affect partnerships or limited liability companies.

D. Webpage Subcommittee (Ron Wargo). Ron Wargo could not attend as he was out of the country.

III. Special Projects

A. Guide to Forming and Operating a Limited Partnership in California. Charles McKee discussed the status of the Guide, and that authors need to submit drafts of their chapters to the editors by January 15, 2009, to allow the editors time to review and be able to discuss the submissions at the February in-person meeting. Steve Halper, Charles McKee, and other authors discussed the progress of their chapters.

B. Revised Limited Liability Company Act (Phil Jelsma). Phil Jelsma reported that the ABA partnerships committee would be meeting to provide guidelines for states that wished to adopt the new model act, and that the main topic for discussion would be series limited liability companies.

IV. Recent Developments

Phil Jelsma reported on the matter of *Olsen v. Halvorson*, issued by the Delaware Chancery Court in October. The court ruled that the statute of limitations applies to oral limited liability company operating agreements, even though the statute expressly allows oral agreements. While most provisions of oral operating agreements would be enforceable, a provision for a multi-year repayment of a member’s contribution was held to be not enforceable.

Charles McKee discussed the case of *Hexion Specialty Chemicals v. Huntsman Corp*, issued by the Delaware Chancery Court in September. In a corporate acquisition context, the target reported

poor quarterly earnings after the merger agreement had been signed but before closing. The buyer wanted to avoid closing the transaction by claiming that there had been a material adverse event. The court held that a material adverse event was an adverse change to the target's long-term earning power over several years, not just months. One quarter of poor earnings is not a material adverse event, unless the poor earnings are expected to continue significantly into the future.

V. Practice Issues

Steve Halper asked the Committee for their views on a law firm taking a fee in a securities offering based on the size of the offering. The Committee discussed the matter, and generally concluded that such an arrangement may compromise the law firm's objectivity and ability to impartially advise the client, or at the least leave the law firm open to such a charge.

Charles McKee asked if any member of the Committee had filed a Form D with the Securities and Exchange Commission under the new electronic filing rules. No one on the Committee had used the new system, but several members said that they would talk to other attorneys in their firms to see if anyone had tried an electronic filing.

There being no further business to come before the Committee, the Chair declared the meeting adjourned at 11:00 A.M.